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No. 94-1919

FILED

JUL 28 1995

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TAP ELECTRICAL CONTRACTING SERVICE, INC.,
Petitioner,

v.

JOHN E. SWEENEY,
as Commissioner of Labor of the State of New York,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF RESPONDENT IN OPPOSITION

DENNIS C. VACCO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8701

VICTORIA A. GRAFFEO
Solicitor General of the
State of New York

DANIEL F. DEVITA
Assistant Attorney General
In Charge of Labor Bureau

M. PATRICIA SMITH *
JENNIFER S. BRAND
Assistant Attorneys General
Attorneys for Respondent

* Counsel of Record

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QUESTION PRESENTED

1. Whether petitioner preserved for review by this Court its claim that the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") preempts the New York State Labor Law's requirement that only employees who are registered with the state as apprentices can be paid less than journey-level wages on public work projects, where petitioner failed to raise the issue until this case was before the New York State Court of Appeals and where the Court of Appeals refused to reach the issue?

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent John E. Sweeney,[1] Commissioner of the New York State Department of Labor ("Commissioner") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by TAP Electrical Contracting Service, Inc. ("TAP"). The petition should be denied because TAP did not preserve the ERISA preemption issue which it seeks to have this Court review and the decision of the New York Court of Appeals does not conflict with the decisions of other courts.

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[1] John E. Sweeney has replaced Thomas F. Hartnett as Commissioner of Labor of the State of New York.

STATEMENT OF THE CASE

1. Statutory Framework

Article 1, § 17 of the New York Constitution provides that workers on public projects shall not be "paid less than the rate of wages prevailing in the same trade or occupation in the locality . . . where such public work is to be situated." Article 8 of the Labor Law, New York Labor Law § 220 *et seq.* (the "prevailing wage law"), carries out this constitutional mandate.

Labor Law § 220(5) requires the fiscal officer, the Commissioner in this case, to determine the prevailing rate of wages and "supplements" to be paid on a public work project. Supplements, or fringe benefits, are defined as any payments which are not "wages", including benefits and vacation and holiday pay. Labor Law § 220 (5)(b).

The law requires that all workers on a public work project be paid the prevailing journey-level wage rates. However, those who are individually registered with the New York State Department of Labor in an apprenticeship training program which is also registered with the State, may be paid an apprentice wage rate. Labor Law § 220(3-e); *Matter of Monarch Electrical v. Roberts,* 70 N.Y.2d 91, 517 N.Y.S.2d 711 (1987).

If the Commissioner finds that a contractor has violated the prevailing wage law, he is empowered to order payment of any wages or supplements due, including interest, and a civil penalty not to exceed twenty-five percent of the total amount due. N.Y. Labor Law § 220(8). Where a violation is found, the Commissioner must make a determination whether the violation was "willful". N.Y. Labor Law § 220(7-a). When there are two final determinations that a contractor has willfully underpaid prevailing wages and supplements within any consecutive six-year period, the contractor is ineligible to bid on any public work project for a period of five years. N.Y. Labor Law § 220-b(3)(b).

2. Factual and Procedural Background

This case originated in TAP's appeal of an October 31, 1989 order and determination of the Commissioner. (Order attached to Petition at A28-A38). That order, which followed an administrative hearing, found that, on a public work project on the Northern State Parkway in 1985, TAP had violated Labor Law § 220, the prevailing wage law, by (1) underpaying prevailing supplements, required under Labor Law § 220; (2) paying less than a journey-level wage and supplement rate to trainee workers on the project who were not registered in a state-registered apprenticeship program, and (3) exceeding the allowable ratio of apprentice workers to journey-level workers on the project. Since that was TAP's second willful violation of the prevailing wage law within a six year period, TAP was debarred from bidding on any public work projects for a period of five years, until November 1994.

TAP appealed the Commissioner's October 31, 1989 order to the New York State Supreme Court, Appellate Division, Second Department,[2] arguing that in light of the recent decision in *General Electric Company v. N.Y. State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), the Commissioner was preempted by the Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.* ("ERISA") from enforcing the supplement provisions of the prevailing wage law ("the supplement claim").[3] TAP

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[2] Labor Law § 220(8) provides that orders in prevailing wage cases be appealed directly to the Appellate Division of the New York State Supreme Court.

[3] At the administrative hearing, the Union Local 363 Fringe Benefit Funds, which was represented as an interested party at the hearing, submitted a third party motion to dismiss "so much of the within complaint . . . which alleges underpayments by TAP to union-affiliated fringe benefit funds on the basis that they were allegedly not made at the 'prevailing levels' " on the ground that they were preempted by ERISA. (Respondent's exhibit C at administrative hearing). TAP joined in the motion. The Hearing

also argued that the Commissioner's failure to allow the payment of less than journey-level wages to "trainees" who were not in a state-registered apprenticeship program was preempted by the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.* ("FAHA") ("the trainee claim"), and that the excessive use of apprentices could not form the basis for TAP's debarment since, pursuant to Labor Law § 220-b(3)(b), debarment may only be based on the willful failure to pay prevailing wages and supplements and not on other violations of the prevailing wage law ("the apprentice ratio claim").

In a decision reported as *Matter of TAP Electrical Contracting Corp. v. Hartnett*, 156 A.D.2d 612, 549 N.Y.S.2d 118 (2d Dept. 1989) (Petition, p. A22-A25), the Second Department held that ERISA preempted the Commissioner from enforcing the supplement provisions of Labor Law § 220 as to those fringe benefits for which TAP maintained ERISA-covered employee benefit plans. However, the court held that the Commissioner could continue to enforce the supplement provisions as to the three benefits for which TAP did not have ERISA employee benefit plans. The court remitted the case to the Commissioner "to compute the exact amount of non-ERISA supplement underpayments." 156 A.D.2d at 614; A25. The court also annulled the Commissioner's determination that TAP could not pay trainees who were not registered with the State as apprentices less than journey-level wages. 156 A.D.2d at 615; A25. Finally, the Second Department noted that the Commissioner's finding that TAP had violated the applicable apprentice ratio had not formed a basis for TAP's debarment. 156 A.D. 2d at 615; A25.

Both parties sought leave to appeal the decision to the New York State Court of Appeals. TAP sought leave to

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Officer denied the motion on the ground that the Commissioner's requirement that TAP pay prevailing supplements did not "relate to" employee benefit plans. (Hearing Officer's Report and Recommendation, pp. 19-24.)

appeal on the supplement claim and the Commissioner sought leave on the trainee claim.[4] Neither party sought further review of the Appellate Division's determination regarding the apprenticeship ratio claim. The Court of Appeals granted both parties leave to appeal.

In its brief to the Court of Appeals, TAP argued for the first time that ERISA preempted the Commissioner from requiring TAP to pay journey-level wages to trainees who were not state registered apprentices (*See* TAP's Reply Brief and Brief in Opposition to Respondent's Appeal, pp. 53-57.) Since all of TAP's prior arguments with respect to the trainee claim concerned whether the Commissioner's actions were preempted by the Federal Aid Highway Act, the Commissioner argued that TAP's ERISA preemption argument had not been preserved for review by the Court of Appeals (*See*, Respondent-cross-appellant's Reply brief, p. 11.) The Court of Appeals agreed. In its decision, reported at 76 N.Y. 2d 164, 556 N.Y.S.2d 998 (Petition, A15-A19) the Court held that the "only argument preserved for our review" was whether the Commissioner was preempted by the Federal-Aid Highway Act from requiring that trainees who were not state-registered apprentices be paid journey-level wages. 76 N.Y.2d at 168; A16. Accordingly, the Court did not address the issue, belatedly raised by TAP, of whether the Commissioner was preempted by ERISA on the trainee claim.[5]

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[4] Both parties also sought to appeal as of right pursuant to New York Civil Practice Law and Rules § 5601(b) to the Court of Appeals on the ground that the issues presented substantial constitutional issues. The Court dismissed the appeals as of right on the ground that the order appealed from did not finally determine the proceeding.

[5] Nor did the Court decide the supplement claims raised by TAP which the Commissioner had also argued were not preserved for review. TAP had raised additional arguments concerning preemption under ERISA of the supplement provisions that had not been raised in either the administrative proceeding or in the Appellate Division (Brief for respondent-cross-appellant, pp. 17-18.)

With regard to the issue that had been preserved, the Court held that there was no preemption under the Federal Aid Highway Act and that substantial evidence supported the Commissioner's finding that TAP's violation of state law on the trainee claim had been willful. Accordingly, the Court reversed the Second Department's decision on this issue and expressly reinstated the Commissioner's order requiring TAP to pay the trainee workers journey-level wages. 76 N.Y.2d at 171; A19.

Following the decision by the Court of Appeals, the case was remanded to the Commisisoner of Labor, in accordance with the Appellate Division's decision, for a computation of the amount of non-ERISA supplement underpayments. Both Counsel for the Department of Labor and TAP's attorneys submitted information to the Commissioner concerning how the supplements should be calculated. On February 6, 1991, the Commissioner issued an Order and Determination on remand from the Appellate Division. (Petition, A10-A14). The Commissioner found that TAP owed $5,093.59 in non-ERISA supplement underpayments.

TAP appealed the Commissioner's February 6, 1991 order to the Appellate Division, Second Department. Although the Second Department's remand, and the Commissioner's order on remand, concerned only the issue of supplement underpayments, TAP raised several issues before the Apellate Division concerning trainee wages and apprentice ratios that either were raised or could have been raised during the appeal of the Commissioner's October 31, 1989 order. Among them was the claim that ERISA preempted the Commissioner from requiring TAP to pay journey-level wages to trainees who were not state-registered apprentices.

In its Order and Judgment dated August 29, 1994 reported as *Matter of TAP Electrical Contracting Service, Inc. v. Hartnett*, 207 A.D.2d 547, 616 N.Y.S.2d 86 (2d Dept. 1994) (Petition A2-A7), the Second Department

rejected the Commissioner's method for computing non-ERISA supplement underpayments and held that there were no such underpayments. 207 A.D.2d at 550; A6. However, it confirmed the Commissioner's order insofar as it found that TAP had willfully violated Labor Law § 220. The court noted that one basis for TAP's debarment had been the trainee claim and that although the court had annulled this determination in its previous order, "the Court of Appeals reinstated this portion of the Commissioner's determination." 207 A.D.2d at 550; A7. Accordingly, the court concluded that TAP's attempt to relitigate the trainee issue was barred by the doctrine of *res judicata*. 207 A.D.2d at 550-51; A7.

TAP filed a notice of appeal of the Appellate Division's decision to the New York Court of Appeals on December 22, 1994 seeking to raise issues concerning the trainee and apprenticeship claims. On February 21, 1995, the Court of Appeals dismissed the appeal on the ground that it did not present a substantial constitutional issue. (Petition, A1).

SUMMARY OF ARGUMENT

The petition should be denied because TAP seeks review of an issue that was not properly preserved in the state court proceeding and, therefore, never ruled upon by the New York Court of Appeals. The issue of whether the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (*"ERISA"*) preempted the New York State Labor Law's requirement that only employees who are registered with the state as apprentices can be paid less than journey-level wages on public work projects, was not raised by TAP until it appealed to the New York Court of Appeals. The Court of Appeals did not reach, much less decide, that issue. Instead, it expressly limited its decision to the issue of whether the state requirement was preempted by the Federal-Aid Highway Act, 23 U.S.C. 101 *et seq.* ("FAHA"). *Matter of TAP Electrical*

Contracting Service Inc. v. Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 998 (1990) (Petition, A15-A19). Since the ERISA preemption issue was "not pressed or passed upon below," this Court should decline to hear TAP's claim. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 79 (1988). Moreover, since the New York Court of Appeals never reached the issue, there is no basis for TAP's assertion that the decision creates a conflict with other courts.

REASONS FOR DENYING THE WRIT

TAP'S CLAIM THAT ERISA PREEMPTS THE NEW YORK STATE LABOR LAW'S REQUIREMENT THAT ONLY STATE REGISTERED EMPLOYEES CAN BE PAID LESS THAN JOURNEY-LEVEL WAGES WAS NOT PRESERVED FOR REVIEW BY THIS COURT

TAP's petition for certiorari is based on its claim that ERISA preempts the New York State Labor Law's requirement that only state-registered employees can be paid less than journey-level wages on public work projects. TAP fails to mention, however, that this issue was not properly raised in the state court proceeding and, therefore, was never addressed by the state courts. Accordingly, this claim was not preserved for review and should not be considered by this Court.

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). *See also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987). Claims that were "not pressed or passed upon below" will not be heard by the Court. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Moreover, when "the highest state court has failed to pass upon a

federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). In this case, TAP cannot satisfy this fundamental requirement for review by this Court.

TAP did not raise the issue of ERISA preemption with respect to the trainee claim until this case was before the New York Court of Appeals. At the first administrative hearing before the Department of Labor, TAP joined in an ERISA preemption challenge which concerned only the supplement claim. No ERISA preemption challenge was made at that time as to the trainee or apprenticeship claims.[6] Similarly, during the appeal of the Commissioner's October 1989 order in the Appellate Division, Second Department, TAP again raised ERISA preemption only as to the supplement claim and, with respect to the trainee claim, raised only the issue of FAHA preemption and preemption under the Davis-Bacon Act, 40 U.S.C. § 276a.

The first reference to ERISA preemption in the context of the trainee claim was made by TAP in reply to the Commissioner's appeal of the Appellate Division's deci-

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[6] TAP erroneously states that "[a]t the outset of the hearings, TAP moved to dismiss the complaint on grounds of ERISA preemption" (Petition, p. 12 n.14), implying that TAP moved to dismiss the entire complaint based on ERISA preemption. However, the motion made by Union Local 363 Fringe Benefit Funds, that was supported by TAP, sought to dismiss only "so much of the within complaint . . . which alleges underpayments by TAP to union-affiliated fringe benefit funds on the basis that they were allegedly not made at the 'prevailing levels' " (Respondent's exhibit C at administrative hearing). Therefore, the motion only concerned the supplement claim. The Hearing Officer's Report and Recommendation denying the claim discusses only ERISA preemption of the supplement claim. (Hearing Officer's Report and Recommendation, pp. 19, 24).

sion in the Court of Appeals (*see* TAP's Reply Brief and Brief in Opposition to Respondent's Appeal, pp. 53-57).[7] The Commissioner argued, in response, that TAP's ERISA preemption argument was not preserved for review. (*See*, Respondent-cross-Appellant's Brief, p. 11). The Court of Appeals agreed and went on to determine only the merits of the FAHA preemption claim, calling that issue the "only argument preserved for our review" 76 N.Y.2d at 168.[8] Since New York State law does not consider issues raised for the first time before the Court of Appeals to be preserved for review, *Cibro Petroleum Products v. Chu*, 67 N.Y.2d 806, 809, 501 N.Y.S. 321 (1986), TAP cannot meet its burden of demonstrating that the ERISA claim was adequately presented in state court.[9]

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[7] In presenting the issues to the Court, TAP argued only that Labor Law § 220 regulated the substantive terms of TAP's training program (TAP's Reply Brief, pp. 53-57). TAP never raised many of the arguments it makes in its petition, i.e., that Labor Law § 220 "refers to" ERISA plans or that the law imposes alternative enforcement mechanisms.

[8] The Court of Appeals stated that "the only argument preserved for our review in these cross-appeals is whether the holding in *Matter of Monarch Elect. Constr. Corp. v. Roberts* (70 NY 2d 91) applies to construction projects jointly funded by the State and Federal governments under the Federal Aid Highway Act" (Petition, p. A-16). In *Monarch*, the Court of Appeals held that under the New York State prevailing wage law federal trainees who were not registered as apprentices with the state could not be paid less than journey-level wages. Thus the issue decided by the Court of Appeals was whether the fact that this project was partially funded under the FAHA prohibited the state from enforcing that section of the prevailing wage law, i.e. whether the state law was preempted by the FAHA.

[9] TAP subsequently attempted to raise the issue of ERISA preemption of the trainee claim in the Appellate Division, Second Department during the remand on the supplement issue and the appeal of the Commissioner's February 1991 order even though the remand did not concern the trainee issue. The Appellate Division held that res judicata barred TAP from relitigating the trainee issue. (Petition, A7).

While TAP acknowledges that the Court of Appeals "did not directly address" the issue of ERISA preemption (Petition, p. 15), it nevertheless seeks to imply that the issue was reached and decided by citing the court's conclusion that "section 220 is not in conflict with or preempted by Federal law" (Petition, p. 15, 76 N.Y.2d at 170, Petition, A19). This reading of the Court's of Appeal's decision is erroneous. The court's decision discusses only preemption under the FAHA and the Davis-Bacon Act and *then* concludes that "[a]ccordingly" the prevailing wage law is not in conflict with Federal law. 76 N.Y.2d at 170. Thus, the Court plainly did not reach, much less decide, the issue of ERISA preemption. Indeed, given the fact that: (a) the Commissioner argued that TAP had failed to preserve the ERISA claim; (b) the Court of Appeals stated that the only argument preserved for review was whether the *Monarch* case applied to this case, and (c) the Court of Appeals did not reach the ERISA issue, it is evident that the Court of Appeals decided that the ERISA issue had not been preserved for review.

Moreover, on this record, there is no basis for TAP's argument that the decision of the Court of Appeals is in "direct conflict" with the decisions of several Federal Courts of Appeals which have held that ERISA preempts various state apprentice program requirements. Since the Court of Appeals did not address the ERISA preemption issue, its decision cannot present a conflict with the cases upon which TAP relies. Accordingly, this Court should deny the petition for certiorari.[10]

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[10] While not addressing the issue in the "Reasons for granting certiorari" section of its petition, TAP states in its "Statement of the Case" that ERISA preemption is also mandated because the supplement provisions of the prevailing wage law impermissibly regulate ERISA plans. (Petition, p. 8) TAP was successful in the Appellate Division Second Department in overturning the Commissioner's actions against TAP on the supplement claim. (Petition, A2-A7). There is, therefore, no existing case or controversy concerning the supplement issue for this Court to consider.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 416-8701

VICTORIA A. GRAFFEO
Solicitor General of the
State of New York

DANIEL F. DEVITA
Assistant Attorney General
In Charge of Labor Bureau

M. PATRICIA SMITH *
JENNIFER S. BRAND
Assistant Attorneys General
Attorneys for Respondent

Dated: New York, New York
July 26, 1995

* Counsel of Record